IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0402
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
RUDY LOYA ROMERO,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20061033

Honorable Howard Hantman, Judge
Honorable John Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Joseph L. Parkhurst
Tucson
Attorneys for Appellee

Law Office of David Alan Darby
By David Alan Darby
Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 Rudy Romero was convicted after a jury trial of one count of sale of a narcotic drug, a class two felony. He was sentenced to a mitigated term of imprisonment of 10.5 years. On appeal, he claims the trial court erred by rejecting his plea agreement, refusing to recuse itself after the rejection, declining to give a requested jury instruction, and denying his motion for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. He also contends the presiding judge erred by refusing his request for a change of judge for cause pursuant to Rule 10.1, Ariz. R. Crim. P. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the evidence and all reasonable inferences in the light most favorable to sustaining the convictions. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In February 2006, Oro Valley Police Officer Mattocks was working undercover in an operation conducted by the Counter Narcotics Alliance (CNA). Mattocks was in an area known for high narcotics trafficking when he was approached by Shabazz. Mattocks told Shabazz he wanted to buy $40 worth of crack cocaine (cocaine base), and Shabazz got into Mattocks's car and directed him to a nearby intersection. When Mattocks and Shabazz got out of the car at that location, they were approached by Romero, who asked, "[W]hat [are you] looking for?" After Mattocks responded he was looking for crack cocaine, Romero said he knew where to get it. The three then walked to a nearby residence, where Mattocks and Shabazz remained on the sidewalk while Romero approached the house and returned with an unknown male.

¶3 Mattocks and the unknown male returned to the door of the residence while Romero and Shabazz waited on the sidewalk. After Mattocks exchanged money for cocaine, the unknown male ran away. Mattocks returned to the sidewalk, and Shabazz and Romero "approach[ed him] with their hand[s] out." Mattocks broke off small pieces of the crack cocaine, the size of a "bb," and handed one to each man. After Mattocks left the area, he weighed the substance he had purchased, which weighed .534 grams. He then field-tested it, and the result was positive for crack cocaine.[1]

¶4 That night, Tucson Police Officer Sampson made contact with Romero at a nearby residence to gather identifying information. Sampson photographed Romero, who was arrested approximately one month later. At trial, Mattocks identified the person in Sampson's photograph as the man he had dealt with during the sale.

¶5 Romero was charged with one count of sale of a narcotic drug, a class two felony. Before trial, Romero filed a motion to accept a negotiated plea agreement. After a hearing, the trial court rejected the agreement, finding that, based on Romero's criminal history, "this plea does not promote the interests of justice." Romero filed a request for a change of judge for cause and, after it was denied, asked the trial court to recuse itself, which the court declined to do. After the jury found Romero guilty, the state proved he had two

[1]During trial, Tucson Police Department criminalist Peterson testified he performed laboratory tests on the substance Mattocks had purchased and confirmed it was crack cocaine or cocaine base.

historical prior felony convictions. The trial court sentenced him to a substantially mitigated term of 10.5 years in prison, and this appeal followed.

Rejection of Plea Agreement

¶6 Romero first argues the trial court erred when it rejected his plea agreement, claiming the court "interfer[ed] in the plea bargain process" and the court's "decision not to accept the negotiated plea agreement was manifestly unreasonable under the circumstances and exercised [sic] on untenable grounds for untenable reasons."[2] The state responds that the trial court properly exercised its discretion. We review a court's decision to reject a plea agreement for an abuse of discretion. *See State v. Superior Court*, 183 Ariz. 327, 330, 903 P.2d 635, 638 (App. 1995).

¶7 A criminal defendant has no constitutional right to a plea agreement. *See State v. Darelli*, 205 Ariz. 458, ¶ 11, 72 P.3d 1277, 1280 (App. 2003). Rule 17.4(d), Ariz. R. Crim. P., requires the trial court to either accept or reject any plea offer that is presented. *See Superior Court*, 183 Ariz. at 330, 903 P.2d at 638. In exercising its discretion, the court should give the agreement "individualized consideration" by "consider[ing] the merits of that agreement in light of the circumstances of the case." *Espinoza v. Martin*, 182 Ariz. 145, 148,

[2]Romero also argues, based on the trial court's remarks during a hearing on August 24, that "[t]he trial court appeared to be more concerned with how plea negotiations were conducted," especially the timing of the offer. Although both parties refer to events that occurred at that hearing, no transcript of the August 24 proceeding was included in the record on appeal. We must therefore rely on the trial court's written ruling, issued August 28, to discern the trial court's reasons for rejecting the plea agreement.

147, 894 P.2d 688, 691, 690 (1995). If the court determines after considering the merits of the agreement that "'the ends of justice and the protection of the public are being served,'" it should accept the agreement; if that is not the case, the court should reject it. *Id*. at 147, 894 P.2d at 690, *quoting Superior Court*, 125 Ariz. at 577, 611 P.2d at 930; *see also Darelli*, 205 Ariz. 458, ¶ 12, 72 P.3d at 1281.

¶8 Romero had initially been charged with a class two felony, and the state had alleged he had four prior felony convictions. The trial court reviewed the plea agreement, which called for Romero to plead guilty to a class four felony and would have expressly excluded his prior convictions for sentencing purposes. The court asked Romero's permission to review the presentence report from one of his four prior convictions to determine the circumstances of the offense. Romero refused, and the court did not review that report. Citing Romero's "four prior felony convictions, his four incarcerations, his commission of new crimes once released from prison, and the serious nature of the current charge of Sale of a Narcotic Drug," the court rejected the proposed plea agreement on the ground it did not "promote the interests of justice."

¶9 Despite Romero's arguments to the contrary, the record shows the trial court did "consider the merits of [the] agreement in light of the circumstances of the case," *Espinoza*, 182 Ariz. at 147, 894 P.2d at 690, and issued a written order supporting its decision to reject the plea. We cannot say the court abused its discretion by rejecting

Romero's plea agreement after considering the circumstances of his new offense and his criminal history. *See Superior Court*, 183 Ariz. at 330, 903 P.2d at 638.

Recusal

¶10 Romero next contends his convictions should be reversed because the trial court did not recuse itself after rejecting the plea agreement and after the presiding judge denied his request for a change of judge for cause. After the court denied Romero's change of judge motion pursuant to Rule 10.1, Romero orally requested at the beginning of trial that the court recuse itself. The state responds that the motion for change of judge was properly denied and there was no basis for the trial court to recuse itself. "We review a trial court's ruling on claims of judicial bias for an abuse of discretion." *State v. Ramsey*, 211 Ariz. 529, ¶ 37, 124 P.3d 756, 768 (App. 2005).

¶11 "'Judges are presumed to be impartial, and the party moving for change of judge must prove a judge's bias or prejudice by a preponderance of the evidence.'" *State v. Ellison*, 213 Ariz. 116, ¶ 37, 140 P.3d 899, 911 (2006), *quoting State v. Smith*, 203 Ariz. 75, ¶ 13, 50 P.3d 825, 829 (2002). Rule 10.1(a) provides for a change of judge when "a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge." The party seeking the change of judge is required to "file a motion verified by affidavit of the moving party and alleging specifically the grounds for the change." Ariz. R. Crim. P. 10.1(b); *see also State v. Curry*, 187 Ariz. 623, 631, 931 P.2d 1133, 1141 (App. 1996). Romero failed to include an affidavit with his motion. The presiding judge of the

superior court denied Romero's motion, stating "[his] arguments regarding [the trial judge's] bias all relate to actions [the judge] has taken from his participation in the case, and are therefore insufficient to demonstrate bias or prejudice." The presiding judge also concluded that Romero's failure to "present[] . . . legally sufficient grounds for a change of judge" made a hearing on the motion unnecessary.

¶12 Romero argues the presiding judge's failure to conduct a hearing on his change of judge motion was an abuse of his discretion. On this record we disagree. The purpose of a Rule 10.1 hearing is to "disclose the facts relied upon" and determine "the legal sufficiency of the affidavit" accompanying the motion. *State v. Harwood*, 110 Ariz. 375, 377, 519 P.2d 177, 179 (1974). In this case, because Romero provided no affidavit or colorable facts supporting his request for a change of judge, we cannot say the presiding judge erred in concluding no hearing was required. *See id*. Moreover, we note the judge correctly determined there were no grounds for a change of judge under Rule 10.1. It is well established that rulings a judge has made in a case are an insufficient basis for a judge's alleged bias or prejudice. *See Ellison*, 213 Ariz. 116, ¶¶ 38, 40, 140 P.3d at 912; *Ramsey*, 211 Ariz. 529, ¶ 38, 124 P.3d at 768; *Curry*, 187 Ariz. at 631, 931 P.2d at 1141.

¶13 After Romero's Rule 10.1 motion was denied, his counsel made an oral motion for the trial court to recuse itself, asserting its rejection of the plea agreement demonstrated the court had "prejudged the facts." In denying the motion, the court stated: "I have no ill will toward you or your client. I'm following the law, as you know from the case law you

cited and I cited, it's based on the interest of justice, the defendant's background, which is what I considered." On appeal, Romero relies on Canon 3 of the Arizona Code of Judicial Conduct to support his claim that the trial court should have recused itself at that point. But that rule of judicial restraint brings no additional weight to this issue where, as discussed above, Romero has failed to provide any factual support for his claims of bias and prejudice. We therefore need not further address the merits of his request for recusal. *See State v. Clabourne*, 194 Ariz. 379, ¶ 51, 983 P.2d 748, 758 (1999). Based on this record, neither the presiding judge nor the trial judge abused his discretion in refusing Romero's requests for a change of judge. *See Ramsey*, 211 Ariz. 529, ¶ 37, 124 P.3d at 768.

Jury Instruction

¶14 Romero further claims the trial court erred by refusing his requested jury instructions regarding the offense of facilitation. The state responds that Romero has conceded in his brief that facilitation is not a lesser-included offense of the sale of narcotics and that the requested instructions were properly denied. We review a trial court's refusal to give requested jury instructions for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006).

¶15 Rule 23.3, Ariz. R. Crim. P., requires a court to instruct the jury on offenses "necessarily included in the offense charged." *See State v. Valenzuela*, 194 Ariz. 404, ¶ 10, 984 P.2d 12, 14 (1999). An offense is a lesser-included offense of another crime when it is impossible to be convicted for the greater offense without having committed the lesser, or

when the charging document actually describes the lesser offense, regardless of whether the conduct described is necessary for a conviction of the greater offense. *See State v. Robles*, 213 Ariz. 268, ¶ 5, 141 P.3d 748, 750-51 (App. 2006). "A lesser-included offense, however, is one composed of fewer elements than the greater offense, not merely one having a lesser penalty." *State v. Woods*, 168 Ariz. 543, 545, 815 P.2d 912, 914 (App. 1991).

¶16 Romero argues the specific facts of his case support the giving of facilitation instructions, citing *State v. Reynolds*, 11 Ariz. App. 532, 536-37, 466 P.2d 405, 409-10 (1970). In *Reynolds*, Division One of this court found the defendant entitled to an instruction on the separate offense of receiving stolen property because if he had merely received the stolen property, he could not be guilty of its theft. But that theory is inapposite here. More on point is *State v. Politte*, 136 Ariz. 117, 121, 664 P.2d 661, 665 (App. 1982), in which this court held that "[f]acilitation is not a necessary included offense of unlawful sale since the sale can be committed without necessarily committing facilitation." Romero concedes that is true but contends his situation is factually distinguishable from *Politte* because, here, the unlawful sale could not have been committed without Romero's having committed facilitation.

¶17 In *Politte*, the defendant was charged with sale of a narcotic drug "on the theory of aiding and abetting," and this court noted that, "[a]lthough the facts here may have supported a conviction for facilitation, that was not the charge." 136 Ariz. at 121, 664 P.2d at 665. The *Politte* court concluded it was not error for the trial court to refuse the requested

facilitation instruction because the defendant was "not entitled to an instruction on another offense even though he might have been charged with and convicted of that offense." *Id*. Romero is in the same situation—although he might have been charged with facilitation, the state instead chose to charge him as an accomplice to the sale of cocaine. The trial court did not abuse its discretion by refusing Romero's requested facilitation instructions. *See Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d at 150.

Rule 20 Motion

¶18 Romero lastly asserts the trial court wrongly denied his motion for judgment of acquittal pursuant to Rule 20, arguing "no proof was presented that [Romero] transported, imported, transferred, offered to sell or transfer[,] or sold a narcotic drug. No evidence was presented [Romero] acted as a principal in the drug sale." We review the trial court's ruling on a motion for judgment of acquittal for an abuse of discretion. *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003).

¶19 Every conviction must be based on "substantial evidence," Rule 20(a), that is, evidence "which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). If reasonable people could differ about whether the evidence establishes a fact that is in issue, the evidence is substantial. *State v. Atwood*, 171 Ariz. 576, 597, 832 P.2d 593, 614 (1992), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25, 25 P.3d 717, 729 (2001). We will reverse a conviction for insufficient evidence "only if 'there is a

complete absence of probative facts to support [the trial court's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶20 Romero was charged with sale of a narcotic drug as an accomplice. "In Arizona, being an accomplice is not a separately chargeable offense; it is merely a theory that the state may utilize to establish the commission of a substantive criminal offense." *Woods*, 168 Ariz. at 544, 815 P.2d at 913. Section 13-301, A.R.S., defines an accomplice as "a person . . . who with the intent to promote or facilitate the commission of an offense" either "[a]ids . . . another person in planning or committing the offense" or "[p]rovides means or opportunity to another person to commit the offense." Section 13-3408(A)(7), A.R.S., prohibits any person from knowingly selling, offering to sell, transferring, or offering to transfer a narcotic drug.[3]

¶21 The evidence at trial showed that, in an area known for narcotics trafficking, Romero had approached Mattocks and Shabazz and told them he knew where to buy crack cocaine. Romero then led the men to a residence in the area, approached the door of that residence, and returned with another man who sold the crack cocaine to Mattocks. From this, the jury could reasonably infer Romero was employed by, associated with, or somehow involved in bringing potential customers to, that particular drug dealer. After Mattocks

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[3]The definition of narcotic drugs in A.R.S. § 13-3401(20)(z) includes coca leaves. Section 13-3401(5) defines coca leaves as "cocaine, its optical isomers and any compound, manufacture, salt, derivative, mixture or preparation of coca leaves."

purchased the cocaine, Romero approached him with his hand out, indicating he expected to receive a portion of the drug. Again, the jury could infer Romero expected some of the crack cocaine as compensation for his services in bringing Mattocks to the dealer.

¶22 Based on this evidence, the jury could reasonably conclude that Romero intended to bring Mattocks to the drug dealer so that the sale of cocaine could occur, satisfying the elements of sale of a narcotic drug as an accomplice. *See* §§ 13-301 and 13-3408(A)(7). The trial court did not abuse its discretion in denying Romero's Rule 20 motion. *See Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d at 458.

Disposition

¶23 Based on the foregoing, Romero's conviction and sentence are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge